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No. _____

In The
SUPREME COURT OF THE UNITED STATES

PAUL WABEKE,
Petitioner

v

ANDREW MULDER,
Respondent

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

By:
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January, 2005

QUESTIONS

1. Whether citizen, who has long been government critic, has right to *pro se* "petition the Government for redress of grievances" and, if so, whether state may permanently enjoin that right?

2. Whether the *Rooker-Feldman Doctrine* should be revisited when it is clear that the First Am. "right to petition . . for redress of grievances" *pro se* cannot be protected in state or lower federal courts?

3. Whether attorney fees awarded by state against *pro se* government critic, who exercised right to petition for redress of grievances, chills First Amendment rights?

4. Whether, regardless of *Rooker-Feldman*, attorney, acting under color of law, has liability for retaliation and false and misleading statements made in judicial proceedings resulting in the deprivation of civil rights?

TABLE OF CONTENTS

QUESTIONS i
INDEX OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL & STATUTORY PROVISIONS 1
First Amendment 1
Fourteenth Amendment 1
Civil Rights Acts of 1871 2
Article VI, cl 2. - Supremacy Clause 2
28 USC 1654 2
STATEMENT OF THE CASE 3
Introduction 3
Petitioner 3
Respondent 3
Facts Of The Two State Permanent Injunctions 4
Ottawa County case 4
The Allegan County Permanent Injunction 6
Federal Civil Rights Case 6
Federal District Court 6
Court of Appeals 7
REASONS FOR GRANTING THE PETITION 8

1. FUNDAMENTAL FIRST AMENDMENT AND OTHER RIGHTS OF PETITIONER, AND OTHER *PRO SE* LITIGANTS, ARE BEING DEPRIVED BY PERMANENT INJUNCTIONS AND CAN CURRENTLY ONLY BE PROTECTED BY THIS COURT. 8

2. PETITIONER REQUESTS THE ROOKER-FELDMAN DOCTRINE BE REVISITED FOR THE FOLLOWING REASONS. 15
A. The Doctrine Violates the First Am. 15
B. The Rooker-Feldman Doctrine Has A Weak Foundation 16
C. The Doctrine Violates the Separation Of Powers. 17

D. The Doctrine Violates the Supremacy Clause of the Constitution. 18
E. The Court Should Resolve The Conflicts Between The Circuits. 19
F. The Court Should Resolve The Conflict Between the Rooker - Feldman Doctrine And The Court's Own Statements. 20

3. ATTORNEY FEES IMPOSED AGAINST CITIZENS ATTEMPTING TO ENFORCE THEIR RIGHTS CHILLS THOSE RIGHTS AND IS RETALIATORY. 22

4. THE COURT SHOULD DECIDE WHETHER THE INCLUDED CIVIL RIGHTS VIOLATIONS OF FRAUD ON THE COURT, CONSPIRACY AND RETALIATION MAY BE PURSUED REGARDLESS OF ROOKER-FELDMAN. 25
A. Respondent Has Liability For False Statements 26
B. Respondent has liability for retaliation. 28

CONCLUSION 29

STATEMENTS ACCORDING TO 28 USC 1746 29

Appendix
A (6th Cir) 1a
B (rehearing) 4a
C (district court) 5a
D (extension of time) 15a

INDEX OF AUTHORITIES

Article I	17
Article III	17
Art. VI	2, 10, 16, 18
First Amendment	1,8,9,13 many
9th Am.	17
10th Am.	17
Fourteenth Amendment	1, 10, 11, 13, 16,22
Michigan Constitution Art. 1, sec 13	2, 10, 12
28 USC 1257	16
28 USC 1331	16
28 USC 1654	2, 10, 12
42 USC 1983	2, 8,16
42 USC 1985(3)	13, 16

Asarco Inc. v Kadish, 490 US 605, 622 (1989)	20
Barrett v Harrington, 130 F.3d 246 (1997 6th Cir.)	14
BE & K Construction Co. v NLRB, 536 US 516 (2002)	10, 15
Becker v Montgomery, 532 US 757 (2001)	6
Board of Commissioner's Wabaunsee Co. v Umbehr, 518 US __, 135 L Ed 2d 843, 116 S Ct __ (1996)	28
Burns v Ohio, 360 US 252 (1959)	24
Business Guides v Chromatic Comm., 498 US 533 (1991)	23
Carpenters v Scott, 463 US 825 (1983)	13
City of Littleton, Col. v Z.J. Gifts, O2-1609 (June 7, 2004)	18, 21
Clay v Sun Ins. 263 US 207, 228 (1964)	24
Davis v Wakelee, 156 US 680, 689 (1895).	28
District of Columbia Court of Appeals v Feldman, 460 US 462 (1983)	many
Elsman v Standard Federal Bank, unpublished 00-2293/01-1544 (6th Cir 2002)	19
England v Louisiana St. Brd Med. Exam., 375 US 411 (1964)	22
Estes v Texas, 381 US 532 (1965)	27
Faretta v California, 422 US 806, 821 (1975)	10, 14
Feldman v US, 322 US 487 (1944)	14
Griffin v Breckenridge, 403 US 88 (1971)	13
Haddle v Garrison, 525 US 121 (1998)	28

Haines v Kerner, 404 US 519, 520 (1972) 6, 10
Hicks v Miranda, 422 US 332, 356 (1975) 16
Hilton v Guyot, 159 US 113 (1895) 27
Jones v Continental Corp, 789 F2d 1225 (6th Cir) 24
Lachance v Erickson, 522 US 262 (1997) 27
Martin v Hunter's Lesse, 14 US 304 (1816) 17
McDonnell Douglas Corp v Green, 411 US 792 (1973) 27
Metropolitian Life Ins. Co. v Brown, (6th Cir. 2002, unpublished, 02-3318) 27
Neitzke v Williams, 490 US 319, 329 (1989) 23, 25
O'Hare Truck Service, Inc. v City of Northlake, 518 US ____, 135 L Ed 2d 874, 116 S Ct ____ (1996) 28
Palazzolo v Rhode Island, 533 US 606 (2001) 25
Pickering v Board of Education, 391 US 563, 571-572 (1968) 28
Pollock v Williams, 322 US 4 (1944) 24
Reid v Covert, 354 US 1 (1957) 11,12,13
Rooker v Fidelity Trust Co., 263 US 413 (1923) many
Rutan v Republican Party of Illinois, 497 US 62, (1990); 28
Southward v South Central Ready Mix, 7 F.3d 487, 492 (6th Cir 1993) 6
Thornblad v Anderson, 104 Fed. Appx. 610 (2004 8th Cir) 20
US Catholic Conference v Abortion Rights Mobilization, Inc. 487 US 72 (1988) 11
US v Cruikshank, 92 US 542, 23 L Ed 588 (1876) 9, 10, 22
Wexler v LePore, 385 F.3d 1336 (2004) 20,21

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the 6th Circuit (No. 03-2235) (unpublished) is reproduced in the appendix. App A, p 1a. The order denying the motion for rehearing is reproduced also. App B, 4a.

The opinion and order of the District Court (No. 1:03-cv-221, W.D. Mich.) granting Defendant Mulder's motion to dismiss under Rule 12(b)(1) is reproduced in the appendix at App C p 5a. The opinion and order dismissing the two state judges is not appended.

JURISDICTION

Jurisdiction rests in 28 USC 1254. The decision of the 6th Circuit was made on June 17, 2004. App A, p 1a Rehearing was denied on August 13, 2004. App B, 4a Extension of time was granted by Justice Stevens until January 10, 2005. App D 15a.

CONSTITUTIONAL & STATUTORY PROVISIONS

First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for redress of grievances."

* * *

Fourteenth Amendment:

Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws."

Section 5. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

* * *

The **Civil Rights Acts of 1871**, enacted pursuant to the 14th Am. sec 5, (42 USC Sec 1983) says in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

* * *

Article VI, cl 2. - Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Since Petitioner has been *pro se* from the start, *28 USC 1654* is also relevant to review. (& see Michigan Const. Art. 1, sec 13 - similar.)

28 USC 1654. Appearance personally or by counsel

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

STATEMENT OF THE CASE

Introduction

Several of Petitioner's fundamental rights have been denied here, but also affecting the whole lower class and much of the middle class of America - the right to petition and speak in state and federal courts *pro se* and, thus, the right to enforce basic civil rights. The questions are directly related to these fundamental rights and should be decided by this Court.

Petitioner has long been a vocal critic of local government. Five state judges have said they have the absolute right to "take" Petitioner's First Am., *pro se* rights, and all other rights enforced by lawsuits, by permanent injunction.

In this civil rights suit, four federal judges have said their hands are tied behind their backs by *Rooker-Feldman*. This is the *second* time the *Rooker-Feldman Doctrine* has barred Petitioner's civil rights lawsuits against Respondent. (The first time was in 1996. See App C, at fn 2 p 10a) It is clear that civil rights violations by those acting under color of law - Respondent and state judges - are totally insulated from federal review by *Rooker-Feldman*, contrary to the intent and design of the 14th Amendment, the Supremacy clause and other Constitutional provisions enacted by the People for their protection and benefit.

If perhaps the facts are not clear enough, Petitioner relies upon the District Court statement of the case. App C 6a.

Petitioner

Mr. Wabeke has long been a vocal critic of the City of Holland, its officials and others. See Aff p 29-30.

Respondent

Defendant Andrew Mulder is, and has long been, the hourly contracted attorney for the City of Holland, Michigan. Defendants Calvin Bosman and Harry Beach are state circuit court judges. App C p 6a.

Facts Of The Two State Permanent Injunctions
Ottawa County case.

In 1997 Wabeke filed a public interest lawsuit against the City of Holland, etc. challenging the lack of right to vote by the taxpayers on the issue of whether the City should spend $54 million to convert a publicly owned island tourist attraction, Windmill Island, to a private gated enclave for a few rich subsidized tenants. Wabeke paid the fees. (Note - The city has about 30,000 residents. After many years and expending large amounts of taxpayer money on the project, recently the City abandoned it.)

Respondent, Andrew Mulder, a private practice attorney representing the City of Holland, argued the suit should be immediately dismissed and Wabeke sanctioned by being permanently enjoined from filing any other lawsuits against the city, et al. In support thereof Mulder listed a number of cases, some where Wabeke was a defendant and appellant, *falsely* and misleadingly stated several facts - Wabeke had filed 16 lawsuits against the City of Holland, etc. - and secured the permanent injunction at issue here prohibiting Wabeke from filing lawsuits in state court against the City of Holland, et al. See App C p 9a for part of order.

Respondent Mulder had been a target of one or more of Wabeke's the lawsuits. See App C p 10a fn 2; (Trans 9-8-97, p 8, 10). Thus he had an inherent bias and possible retaliatory motive in imposing the sanctions. Furthermore, he did not enter any evidence, only his self serving arguments, that the cases were without merit and that Wabeke had lost. Mulder further admitted the permanent injunction is an "extraordinary remedy," that it affects "open access to our courts" and the "First Amendment." (Trans 9-8-97, p 5, 9) Mulder even included appeals in the number. (Id. p 8) While it is true Wabeke lost all the cases, it is not because none of them had any merit. More likely because of judges biased in favor of government and its officials. See Aff 29-30. Without letting the case reach first base, on virtually one page of the transcripts, the state judge

dismissed the case and granted the motion for permanent injunction against Wabeke and $500 for attorney fees. (Trans 9-8-97, p 17) (Note: the Judge's decision lacked all elements of a valid judicial decision - no fact finding or discussion, no review of law or discussion, no determination that Wabeke had filed a totally frivolous lawsuit. See *Southward v South Central Ready Mix*, 7 F.3d 487, 492 (6th Cir 1993). He did not view any facts or make any findings of fact or investigate the cases cited or anything else, which would constitute Due Process of Law.)

He then signed an order drafted by Respondent Mulder. Because Michigan Court Rules allow biased *attorneys* to write the judges orders, a likely unconstitutional procedure, Respondent Mulder took advantage of the opportunity. In the order he prepared he included the following: "and the award of costs for frivolous and vexatious proceedings by the Plaintiff", a finding *not* made by the judge. (Order dated Oct. 13th, 1997, p 1)

Wabeke objected and claimed Due Process violations. (Trans 10-13-97, p 2, Mulder's oral argument.) But they were ignored and the order signed.

Petitioner appealed *by right* to the Michigan Court of Appeals which, in a Memorandum Opinion, decided against Wabeke. Without discussing or stating any facts in support or addressing Wabeke's appeal evidence and claims of fraud via false and misleading statements, etc., it concluded: "Plaintiff was afforded due process in connection with the imposition of sanctions." It also concluded in error and without review of the cases and contrary to Wabeke's filings that "Plaintiff's *documented history of filing frivolous actions* and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future." (emphasis added) (MCA #207260, p 2 - *Wabeke v City of Holland*, 199 Mich App LEXIS 378 (1999)) See part at App C p 10a-11a.

Petitioner then moved for rehearing. It was denied on May 24, 1999. No further appeals were filed. Thus, the Ottawa County permanent injunction remains in effect to

this day. (Note: The Due Process violations noted here involving this *pro se* litigant are not uncommon by any means within Michigan, or the 6th Circuit. See Aff p 29-30)

The Allegan County Permanent Injunction

Subsequently, another public issue arose[12] where Petitioner felt compelled to file another public interest lawsuit against the City of Holland. Because the City of Holland covers parts of two counties (Ottawa and Allegan), Mr. Wabeke was able to file a subsequent lawsuit against the City of Holland in Allegan County over the new issue and evade the Ottawa Co. permanent injunction. However, that suit was likewise dismissed and a second identical permanent injunction issued also. See App C 11a.

Respondent Mulder again filed a motion for summary judgment and sanctions. He again made *false and misleading statements to the court* and secured attorney fees and the second permanent injunction.

Federal Civil Rights Case

Federal District Court

Petitioner believed his civil rights were violated by the permanent injunctions. Therefore he filed his complaint in federal court against Respondent Mulder and the two state judges contending that his civil rights had been violated by the injunctions and attempting to get them reversed and damages.

Petitioner believes that the district court had jurisdiction under 28 USC 1331 and 42 USC 1983 and other provisions, but somehow failed to include such. He believes, however, that this is a correctable error by amendment. See *Becker v Montgomery*, 532 US 757 (2001); *Haines v Kerner*, 404 US 519, 520 (1972) Petitioner did seek to amend. See following.

Defendants moved to dismiss on various grounds. The district court granted the judges' motion to dismiss.

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[1] Wabeke sought a temporary injunction against the City of Holland in regards to extensive renovations of the donated Kollen Park.

In his answer, Respondent contended he has qualified immunity. Respondent Mulder then moved to dismiss under *Rooker-Feldman*.

Petitioner sought to prove that Attorney Mulder engaged in fraud on the court by his false and misleading statements to the state court judges to obtain the injunction. Because it dismissed based on the *Rooker-Feldman Doctrine*, the district court only acknowledged the argument without attempting to either see or find the truth of it. See App C p 13a.

The Federal District Court decision quotes in part the two identical permanent injunctions issued by the state court judges. App C p 9a. However, it omits the reasons why the state lawsuits were filed. It does note the subsequent appeal by right in the first state case to three judges of the Michigan Court of Appeals and their affirmance. App C p 9a The District Court held that *Rooker-Feldman* prohibited it from exercising subject matter jurisdiction to protect Petitioner's rights and dismissed. App C p 5a It noted that the "right of access to courts is neither absolute or unconditional" Id. p 12a fn 3.

It did note, however, that "Plaintiff certainly disagrees with arguments Attorney Mulder made in state court and believes that Mulder mislead the state court judges." App C p 13a.

Court of Appeals

Petitioner timely appealed - paying the fee - and filed his timely brief based on the *pro se* format provided by the court. Petitioner filed a motion to Amend his Complaint as to First Amendment issues and other various respects on Dec. 15, 2003. An order was filed on Dec. 16, 2003 stating: "It is ordered that the motion is denied without prejudice to being reconsidered should the district court first deny the relief requested."

On June 17, 2004 the 6th Cir. affirmed the dismissal below based on the *Rooker-Feldman Doctrine*. App A, p 1a.

On June 28, 2004 Petitioner filed a motion for reconsideration. It briefly mentioned his First Amendment

rights. Since there was no subject matter jurisdiction, they apparently could not rule on the issues anyway. On July 12, 2004 he filed a motion to amend his motion for reconsideration addressing concerns about the 14th Amendment and fraud by Respondent.

On August 13, 2004 the Court denied reconsideration concluding it "had not overlooked any point of law or fact." App B, p 4a.

The 6th Circuit decision correctly identified this as a 42 USC 1983 case. App B, p 4a Petitioner totally agrees with that because Respondent Mulder was acting under color of law of the state and on behalf of the City of Holland when he sought the permanent injunction against Petitioner.

REASONS FOR GRANTING THE PETITION

1. FUNDAMENTAL FIRST AMENDMENT AND OTHER RIGHTS OF PETITIONER, AND OTHER *PRO SE* LITIGANTS, ARE BEING DEPRIVED BY PERMANENT INJUNCTIONS AND CAN CURRENTLY ONLY BE PROTECTED BY THIS COURT.

The First Amendment of the "Bill of Rights" provides for protection of the rights to "freedom of speech" and to "petition the Government for redress of grievances." These rights of Petitioner have been violated by the State of Michigan's permanent injunctions. The 14th Am. protects these rights and liberties from being violated by the State. But relief is not available in lower federal courts because of the *Rooker-Feldman Doctrine*. Therefore, Petitioner seeks the protection of this Court.

This Court has addressed the post 14th Am. ratification rights of citizens and the duties of the States under the Constitution to protect their liberties.

> "The rights of life and personal liberty are natural rights of man. `To secure these rights,' says the Declaration of Independence, `governments are instituted among men, deriving their just powers from

> the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these `unalienable rights with which they were endowed by their Creator.'" *US v Cruikshank*, 92 US 542, 23 L Ed 588, 592 (1876)

This Court must become involved when States suppress these liberties and no other remedy is available.

This Court said the First Amendment right of petitioning "is an attribute of national citizenship and, as such, *under the protection of and guaranteed by, the United States*. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." (emphasis added) *US v Cruikshank*, 92 US 542, 23 L Ed 588, 591 (1876) Petitioner seeks that guarantee of protection from this Court now, otherwise, it is a blank guarantee and empty promise.

> "*First Amendment rights require special safeguards.*" *Branzburg v Hayes*, 408 US 665, 738 (1972) (J. Stewart, dissenting). "The decisions of this Court have `consistently held that *only a compelling state interest* in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' *NAACP v Button*, 371 US at 438." (all emphasis added) *Id.* at 739.

Petitioner believes that the rights at issue - speech and petitioning in judicial forum - are protected and beyond the power of the State to regulate, by means of the First Amendment and 14th Amendment. Furthermore, the State has no "compelling state interest" (*Id.*) in suppressing *pro se* speech in court proceedings and has never expressed any. In fact, the opposite is true - it has a compelling interest in protecting the speech of *pro se* litigants and critics, because of the truth they seek to present and the wrongs they attempt to expose.

The majority in *Branzburg* stated: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government . ." *Id.* 689. (See also Supremacy Clause, Art. VI, and 14th Am.) That is exactly what a "petition for redress of grievances" in the courts is *suppose* to provide, but, as in this case, doesn't.

This Court recently upheld a corporation's right to petition for redress of grievances. *BE & K Construction Co. v NLRB*, 536 US 516 (2002). Petitioner, and other *pro se* litigants, deserve and request "equal protection." See *Cruikshank*, at L ed 592. It is evident from the District Court that other *pro se* litigants have also been barred by permanent injunctions from filing lawsuits in *federal* courts, just as Petitioner has been for 7 years in Michigan State courts. See App C at p 12a, fn 3. Apparently, *pro se* litigants, as an inferior class, have been targeted by the judicial powers for this suppressive punishment. See Aff p 29-30.

All of these persons have been permanently enjoined in various ways by state and federal judges at the insistence of government agents - lawyers. Secondly, it is obvious that the rights taken from them are not usually restored by judicial process, and, therefore, literally remain for life, as in this case. For these reasons and the supreme importance of the fundamental rights involved, question one should be addressed first, before the *Rooker-Feldman* issue.

Pro se litigants supposedly have Equal Constitutional rights to wealthier citizens who can find and afford attorneys. 14th Am. Plus the law grants them the right to represent themselves. 28 USC 1654; See also Mich. Const. Art. 1 sec 13; *Haines v Kerner*, 404 US 519, 520 (1972); *Faretta v California*, 422 US 806 (1975). But they are a despised and persecuted class in judicial proceedings, dominated by members of the Bar. See Aff. 29-30.

Granted by its terms the First Amendment is limited to "Congress." But this Court has held:

> "The prohibitions of the Constitution were designed to apply to *all branches* of the National Government

and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid v Covert*, 354 US 1, 17 (1957).

n62 Even during time of war the Constitution must be observed. *Ex parte Milligan*, 4 Wall. 2, at 120, declares:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

Also see *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156; *United States v. Commodities Trading Corp.*, 339 U.S. 121, 125. *Reid v Covert*, 354 US 1, 35 (1957).

Since the Constitution may not be violated by the federal government, it is unreasonable that it can be violated by the state, as here.

"It rests instead on the *central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts,* no less than the political branches of the government, *must respect the limits of their authority.*" (emphasis added) *US Catholic Conference v Abortion Rights Mobilization, Inc.* 487 US 72, 77, 108 S Ct 2268, 101 L Ed 2d 69 (1988)

In addition, the 14th Amendment clearly secured "the prohibitions of the Constitution" from further violations by the states. Therefore, Petitioner is of belief that the permanent injunction against him filing lawsuits *pro se* in state court against local government and its officials is a clear violation of several of his constitutional rights.

This question was not answered - avoided - by the lower federal courts because of the *Rooker-Feldman Doctrine* and its bar of "subject matter jurisdiction." (App C) But the state has said, by three of its courts, Petitioner does *not* have a right to "petition the [state] government for redress of grievances" *pro se*. (See App C p 8a-11a)

Petitioner also claims the protections of 28 USC 1654 and Michigan Constitution Art. 1, sec 13, which protect his rights to represent himself in court - *pro se* rights. These rights are directly violated by the injunction and unequally applied to only *pro se* litigants.

To some this violation of *pro se* litigants rights is a: "*slight encroachment on the Bill of Rights and other safeguards in the Constitution [that] need cause little concern*. But . . . a tempting precedent. Slight encroachments create new boundaries from which legions of power can seek new territory to capture. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." n74 [n74 *Boyd v. United States*, 116 U.S. 616, 635.] *Reid v Covert*, 354 US 1, 39-40 (1957).

The state is acting through its judges in this case to violate the First Amendment rights of Petitioner. Alexander Hamilton had a warning about judges that must be

considered, but also re-examined in light of the current case and the permanent injunctions imposed by the judges.

> n66 Speaking of the imperative necessity that judges be independent, Hamilton declared:
> ". . . *Liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments*; . . . nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." The Federalist, No. 78. *Reid v Covert*, 354 US 1, 36 (1957).

Citizens, like Petitioner, have a substantial right to fear judges for what they can do to them, as shown here and other cases. (See App C p 12a fn 3)

The facts are confirmed that Wabeke has sued the City of Holland and/or its officials several times before. (App C p 10a fn 2) Wabeke has long been the most vocal critic of local government and its officials. (Affidavit of Wabeke p 29-30) Silencing his voice and lawsuits directly insulates local government officials from exposure.

Petitioner believes there has long been a conspira[illegible] to silence him. (See App C, p 10a fn 3 and note date.)

This Court in *Carpenters v Scott*, 463 US 825 (1983) held that, in addition to the 4 elements of *Griffin v Breckenridge*, 403 US 88 (1971), state involvement is an essential element in a conspiracy to deprive First Amendment rights under 42 USC 1985(3). US at 829-830. Obviously this case has state involvement, and the deprivation of First Amendment rights and Equal Protection rights of the *pro se* Petitioner.

> "The Equal Protection Clause of the Fourteenth Amendment prohibits any State from denying any person the equal protection of the laws. The First

> Amendment, which by virtue of the Due Process Clause of the Fourteenth Amendment now applies to State governments and their officials, *prohibits* either Congress *or a State* from making any "law . . . abridging the freedom of speech, . . or the right of the people peaceably to assemble." *Id.* at 831.

Petitioner believes the imposition of permanent injunctions on Petitioner, and other *pro se* litigants, has its oppressive roots in the Star Chamber. "[B]ecause it specialized in trying `*political*' offenses, the Star Chamber has for centuries symbolized disregard of basic individual rights." (emphasis added) *Faretta v California*, 422 US 806, 821 (1975) (See also fns 17, 18). Justice Black dissenting in *Feldman v US*, 322 US 487, 499-500 (1944) stated that the Founders ". . . still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies *which had brought religious and political nonconformists within the penalties of the law* by means of their own testimony." Petitioner has been barred from filing lawsuits because of his whistleblowing critical political views. (See Aff p 29-30)

Petition for redress of grievances and civil rights lawsuits are by nature political. Retaliation for filing such lawsuits has been long been prohibited. See post at p 28.

Permanent injunctions are a new and innovative form of retaliation and silencing of critics and opponents that this Court should review.

Lastly, Petitioner has long been a vocal critic of those who have imposed the permanent injunction on him. Besides his lawsuits, he has been critical in official town meetings. (See Aff. 29-30) That also is protected - speech.

> "`Criticism of government is at the very center of the constitutionally protected area of free discussion.' *Rosenblatt v Baer*, 383 US 75, 85, 86 S Ct 669, 675-676, 15 L Ed 597 (1996) n26 * * * Freedom to criticize public officials *and expose their wrongdoings* is at the core of First Amendment values . . " (emphasis added) *Barrett v Harrington*, 130 F.3d 246, 262-263 (1997 6th Cir.)

Therefore, the injunction has a multiple purpose - to suppress speech and exposure of local officials, to retaliate, and to hide the judicial bias exposure that may be revealed on appeal, provided justice is available.

2. PETITIONER REQUESTS THE ROOKER-FELDMAN DOCTRINE BE REVISITED FOR THE FOLLOWING REASONS.

A. The Doctrine Violates the First Am.

The First Amendment guarantees the right to "petition the *Government* (the federal government in this case) for redress of grievances". Since the First Amendment was initially only applied to the federal government, that right directly includes the right to sue in federal courts. The *Rooker-Feldman Doctrine* violates this right.

Recently in *BE & K Construction Co. v NLRB*, 536 US 516 (2002) this Court expressed its wise intent to protect this right from judicial (or quasi judicial) interference and nullification.

Equal Protection means the First Amendment right of petition cannot be affirmed in one case and violated in another, especially only in *pro se* cases. As shown in the preceding section, *Rooker-Feldman* has completely obstructed enforcement of fundamental First Am. rights of "Speech" and "Petition."

Hopefully this it is clear enough from the previous argument (incorporated here) that First Amendment rights cannot be enforced in the lower federal courts when violated by the States. These reasons alone are sufficient to revisit and overrule *Rooker-Feldman*.

Secondly, this Court needs to first fully consider the following question: Should every citizen, *pro se* or not, violated by the uncountable multitude of state officials (See Declaration of Independence) in, and related to, judicial and quasi-judicial proceedings be required to and limited to appeal to this Court in order to enforce their Constitutional rights? (1000's of cases per year. Unbelievable!) As the lower

courts have said, that is exactly what the *Rooker-Feldman Doctrine* requires.

B. The Rooker-Feldman Doctrine Has A Weak Foundation

The cases of *Rooker v Fidelity Trust Co.*, 263 US 413 (1923) and *District of Columbia Court of Appeals v Feldman*, 460 US 462 (1983) were very limited and did not fully or even partially address the whole of the Constitution or even major parts, therefore, it should be revisited. Both *Rooker and Feldman* considered only 28 USC 1257. *Rooker* was decided on the very limited basis of a motion to dismiss.

In *Feldman*, Justice Stevens dissented contending that "collateral attack" is permissible under 28 USC 1331. *Id.* at 490. Neither case considered the Supremacy Clause, the 14th Amendment, the Separation of Powers, or 42 USC 1983 and other civil rights statutes.

It is clear from this case that the *Rooker-Feldman Doctrine* on its face and as applied completely ". . ousts the federal courts from their historic role as the `primary reliances' for vindicating constitutional freedoms." *Hicks v Miranda*, 422 US 332, 356 (1975) (dissent).

Rooker-Feldman must be revisited because it does not consider substantial portions of the Constitution. Previous to the 14th Amendment the states had a long sordid history of violating the Federal Constitution, even though they had an obligation to uphold federal rights and law via the Supremacy Clause, Art. VI.

Congress, with the support of the People, intended to remedy these violations of the Bill of Rights by the states in the 14th Am. Subsequent to the 14th Am. adoption, statutes such as 42 USC 1983, 1985 and other civil rights statutes were enacted according to the power authorized by Sec 5. They specifically provided a federal court remedy to enforce federal rights against the states - regardless of whether the offense occurred in judicial proceedings or outside them.

The Doctrine forces Petitioner and hundreds of other litigants back to pre 14th Am. America, having their rights violated by state officials with no relief - state or federal.

C. The Doctrine Violates the Separation Of Powers.

The Constitution separated powers for good reasons. But the *Rooker-Feldman Doctrine* forbids the federal courts from doing exactly what they were intended to do - "enforce" the civil rights laws against the states. In *Martin v Hunter's Lesse*, 14 US 304, 4 L Ed 97, 1 Wheaton at 304 (1816) this Court said:

> "The object of the Constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and *enforce* them." (emphasis added)

Note that protecting the States or their judicial branch is not one of the duties of any federal branch. Also Article III, sec 1, specifically states that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts *as the Congress* may from time to time ordain and establish." (emphasis added) Note that it does not say "state courts". Note also that Congress was not authorized to and did not establish any state courts.

Article I, sec 8, states: "The *Congress* shall have power to * * * constitute Tribunals inferior to the supreme Court;" Conceding authority over federal rights exclusively to the state courts, as *Rooker-Feldman* does, is totally inconsistent with this part of the Constitution.

It also should be remembered that the 10 th Am. grants only limited rights to the States after the 9th Am. granted the vast majority to the People.

D. The Doctrine Violates the Supremacy Clause of the Constitution.

The Supremacy Clause mandates that States are bound by and will follow the federal Constitution and federal laws. But the *Rooker-Feldman Doctrine* undermines the enforcement tool provided by Congress in accord with the 14th Amendment . States do not have to honor federal law, if they do not want to. And there is no federal consequence, unless by slim chance (1% or less) an appeal to the Supreme Court is accepted. Should fundamental rights depend upon such infinitesimal odds?

When states do not uphold the Constitution, as here and many other cases, there is no avenue of relief via lower federal courts because of the *Rooker-Feldman Doctrine* and also because of res judicata and collateral estoppel.

The Supremacy Clause states in part:
"The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

But where is the stick to force the States to comply? This is a mandate to state courts and to this Court by the People. It, together with other parts of the Constitution, does not allow for the *Rooker-Feldman Doctrine*.

This Court has acknowledged that states may or may not incorporate "required procedural safeguards" into their law.

> *Freedman* itself said: "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." 380 US, at 60." *City of Littleton, Col. v Z.J. Gifts,* at ___)

When state governments and judges chose not to "safeguard" federal rights, should they then be protected from federal lawsuits to enforce such "safeguards" by the *Rooker-Feldman Doctrine*, as here? Both lower courts and this Court have said YES. It is time to revisit this Doctrine.

E. The Court Should Resolve The Conflicts Between The Circuits.

The 6th Circuit has habitually applied the *Rooker-Feldman Doctrine* to bar federal civil rights cases, especially in *pro se* cases, where a state case was involved, as in this case. (See App C, p 10a, fn 3, - *Wabeke v Mulder*, No. 95-2099, 1996 WL 571302)

In *Elsman v Standard Federal Bank (a Michigan case)*, unpublished 00-2293/01-1544 (6th Cir 2002) the application of *Rooker-Feldman* by the District Court was affirmed on appeal. (Elsman had filed his federal suit to challenge the taking of his real and personal property and the state procedure that allowed such and failed - refused? - to protect his property rights. *Branzburg* stated: "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government . ." *Id.* 689).

The district court held, according to the 6th Circuit, that:

> "Relying on the *Rooker/Feldman doctrine* (citations omitted) the court noted that it did not have jurisdiction to review the holdings of the Michigan courts and if an appeal were to be taken it should be to the United States Supreme Court. The court also held that the claims not fully litigated in the state court were barred by the doctrine of *res judicata*. In a *seeming contradiction*, however, the district court concluded that all of Elsman's arguments had been presented and ruled on in a previous lawsuit involving the same parties. The district court did not identify to which arguments it was referring." (emphasis added) *Id.* at 7-8.

On appeal Elsman argued against the *Rooker-Feldman doctrine*, but the 6th Circuit applied the *Rooker-Feldman doctrine* to determine the district court had no subject-matter jurisdiction over the real property claims. However, when it came to Elsman's personal property claims it stated they "present a more difficult question." Ultimately the 6th

Circuit held that "the district court . . . erroneously dismissed those claims based on *res judicata*." *Id.* at 19. Nevertheless, it did not reverse or remand on this issue, as justice would dictate. Instead it affirmed.

The 8th Circuit has broadly applied *Rooker-Feldman*. It has even allowed *sua sponte* "preservice dismissal" of *pro se* complaints. For example in *Thornblad v Anderson*, 104 Fed. Appx. 610 (2004 8th Cir) it states:

> "Joseph D. Thornblad appeals the district court's *preservice dismissal* of his 42 USC 1983 complaint as barred by Rooker-Feldman. * * * [W]e agree with the district court that the action was Rooker-Feldman barred because Thornblad's federal complaint raised constitutional challenges already decided by the Minnesota state courts." (emphasis added)

In contrast, the 11th Circuit has not followed that path. See *Wexler v Lepore*, 385 F.3d 1336, (2004, 11th Cir). In *Wexler*, an appeal was made and decided by the state court, but still the 11th Circuit did not apply *Rooker-Feldman*. See fn 5.

(Petitioner does not have the capability to research all the Rooker-Feldman cases.)

F. The Court Should Resolve The Conflict Between the Rooker - Feldman Doctrine And The Courts Own Statements.

In addition to the above conflicts, this Court has narrowed its *Rooker-Feldman Doctrine*, but it is not generally recognized by lower courts.

> "The Rooker-Feldman Doctrine interprets 28 USC 1257 as *ordinarily* barring direct review in the lower federal courts of *a decision reached by the highest state court*, for such authority is vested solely in this Court." (citation omitted) (emphasis added) *Asarco Inc. v Kadish*, 490 US 605, 622 (1989)

Asarco also endorsed prior precedents in apparent conflict with *Rooker-Feldman*. It cited "*Minnesota v National Tea Co.*, 309 US 551, 557 (1940)(this Court is responsible for

assuring "that *state courts will not be the final arbiters* of important issues under the federal constitution.")" (emphasis added) It went on to state:

"The predominent interest promoted by *this apparent exception* to normal preclusion doctrines is to assure that the binding application of federal law is uniform and ultimately subject to control by this Court. See *Richardson v Ramirez*, 418 US 24, 42, n. 13 (1974) (this Court may review a declaratory judgment granted by a state court, for "any other conclusion would unnecessarily permit a state court of last resort, quite contrary to the intention of Congress in enacting 28 USC 1257, to invalidate state legislation on federal constitutional grounds without any possibility of state officials who were adversely affected by the decision seeking review in this Court"). (emphasis added) *Id.* at 621-622.

Then this Court has said:

"`there are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled . . . to accept instead a state court's determination of those claims.' *England v La. State Bd of Med. Examiners*, 375 US 411, 84 S Ct 461, 464, 11 L Ed 2d 440 (1964)." *Wexler v LePore*, 385 F.3d 1336 (2004)

"The possibility of appellate review by this Court of a state court determination *may not be substituted, against a party's wishes, for his right to litigate his federal claims fully in the federal courts.* We made this clear only last Term in *NAACP v. Button, supra,* 371 U.S., at 427, when we said that "a party has the right to return to the District Court, after obtaining the authoritative state court construction for which the court abstained, for a final determination of his claim." (emphasis

added) *England v Louisiana St. Brd Med. Exam.*, 375 US 411, 11 L Ed 2d 440, 84 S Ct 461 (1964)

This Court as recently as June of 2004 stated in *City of Littleton, Col. v Z.J. Gifts*, O2-1609 (June 7, 2004) that if a First Amendment adult book store *challenge to state or local law* is not quickly or properly heard in a state court that *a federal remedy under 42 USC 1983 is available in federal court.* But that is not true, when the *Rooker-Feldman Doctrine* defense is raised and applied as here and in hundreds of other cases.

Do citizens barred enforcement of their civil rights in state and federal court enjoy Equal Rights as required?

> "The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one that precedes it and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of rights of citizens is a principle of republicanism. Every republican government is duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National government is limited to the enforcement of this guaranty." *US v Cruikshank*, 92 US 542, 23 L Ed 588, 592 (1876)

Furthermore, it appears that the *Rooker-Feldman Doctrine* has become a swift and sure method of clearing the federal docket, especially of *pro se* cases, and of protecting, undeservedly, the reputations of local officials and state judges.

3. ATTORNEY FEES IMPOSED AGAINST CITIZENS ATTEMPTING TO ENFORCE THEIR RIGHTS CHILLS THOSE RIGHTS AND IS RETALIATORY.

Do attorney fees awarded against citizens for petitioning for redress of grievances, as protected by the First Amendment, chill civil rights or amount to retaliation? This Court should decide the question.

One of the arguments Respondent Mulder offered in support of the permanent injunctions against Wabeke filing lawsuits was that Wabeke had not paid attorney fees awarded against him in past state lawsuits. See App C 9-10a, fn3; also Aff p 30 (Trans papers) In fact, subsequently, in both of the state permanent injunction cases, where Wabeke was enjoined by Respondent from filing future lawsuits against the City of Holland, attorney fees were imposed against him also, in favor of the City.

Petitioner believes that imposing attorney fees in favor of government against citizens seeking to protect their civil rights, or who are blowing the whistle on government misconduct, is oppressive and chills various rights including the First Am. "right to . . . petition for redress of greivances."

Citizens should not "fear" they will incurr large financial liabilities, with small chances of winning, to enforce their Constitutional rights.

Fear is a substantial motivator. In *Neitzke v Williams*, 490 US 319, 328, 104 L Ed 2d 338, 109 S Ct 1827 (1989) this Court stated:

> ". . . the *fear of financial sanctions doubtless deter* most inarguable paid claims, but such deterrence presumably screens out far less frequently those arguably meritorious legal theories whose ultimate failure is not apparent at the outset."

In *Business Guides v Chromatic Comm.*, 498 US 533, 570, (1991) four dissenting Justices said that there is a real possibility that "honest claimants [would] *fear to petition the courts.*" Thus it is clear that imposition of attorney fees creates that "fear" and impedes civil rights enforcement,

especially for those who, like Petitioner, are poor and unable to hire competent attorneys to present their cases.

There is evidence in this record, citing other cases, where substantial financial liabilities are imposed by permanent injunctions to suppress exercise of constitutional rights. (See App C 12a fn 3)

Petitioner, and many other civil rights plaintiffs, are poor or middle class, at best. See Petitioner's Affidavit p 30. Justice Douglas dissenting in *Clay v Sun Ins.* 263 US 207, 228 (1964) stated: "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two." This Court has decided that the poor cannot be deprived of appeal by leave to the highest court of a state because they cannot pay the filing fee. See *Burns v Ohio*, 360 US 252 (1959). See also *Pollock v Williams*, 322 US 4, 15 (1944). It is equally unconstitutional that they be forced to pay the government's attorney fees when they lose civil rights cases they bring *pro se*.

This is true despite the fact that some federal courts of appeals have held that imposition of attorney fees against civil rights plaintiffs must not be a routine practice.

In *Jones v Continental Corp*, 789 F2d 1225, 1232 (6th Cir) it was said: "An award of attorney's fees against a losing plaintiff in a civil rights action is an *extreme sanction*, and must be limited to truly egregious cases of misconduct." (emphasis added) There was no indication of any misconduct in the Wabeke state cases and certainly nothing "egregious."

But, despite federal law, apparently the Michigan courts are free to "take" attorney fees at will from citizens coming before it. Does the Constitution must offer any protection?

However, even federal court practice is inconsistent. Federal district courts have not only imposed attorney fees in civil rights cases, but also have enjoined suits until large bonds are posted by *pro se* plaintiffs in advance of suit sufficient to cover substantial amounts of attorney fees in order protect government defendants before filing any new

civil rights suit. See App C 12a fn 3; plus there are other cases.

This Court has held that the general public should be responsible for certain things benefiting the whole body of citizens.

> "The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is "`designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Penn Central, supra,* at 123-124 (quoting *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)). The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. - *Palazzolo v Rhode Island,* 533 US 606, 633 (2001) (Justice O`Conner concurring)

Furthermore the line between frivolous and not frivolous is extremely vague and difficult to discern, even for judges. See *Neitzke v Williams,* 490 US 319, 329 (1989) ("not all unsuccessful claims are frivolous"). Sanctions were imposed on Petitioner because he was unsuccessful, with false assertions of being "frivolous." Attorneys and biased judges can claim a case is frivolous when it is not.

In the Wabeke state cases, neither judge made any findings that the case was frivolous, despite what is written in the order drafted by attorney Mulder.

The question should be addressed with the others.

4. THE COURT SHOULD DECIDE WHETHER THE INCLUDED CIVIL RIGHTS VIOLATIONS OF FRAUD ON THE COURT, CONSPIRACY AND RETALIATION MAY BE PURSUED REGARDLESS OF ROOKER-FELDMAN.

Respondent Mulder has claimed the qualified immunity defense, apparently contending either the right to

petition for redress of grievances or the right to not be permanently enjoined from filing lawsuits was not clearly established. Petitioner believes both have long been establised. Furthermore, other acts committed by Mr. Mulder, like fraud on the court and retaliation, have long been established.

Petitioner believes that the right to petitioning for redress of grievances was established at the time the Bill of Rights was adopted. If not then, it was at the time the 14th Amendment was adopted. Secondly, the right to not be permanently enjoined from petitioning was likewise established at the same time. Judges are confined to acting within the law.

Mr. Mulder recognized when he moved for the first injunction that First Amendment rights were involved. (See Trans) Therefore, he cannot contend that those rights were not established. Qualified immunity is a frivolous and false argument intending to evade liability.

A. Respondent Has Liability For False Statements

In addition, Petitioner has long argued and demonstrated Respondent Mulder, an attorney representing the City of Holland, made, and repeated in various courts, false and misleading statements to secure the permanent injunctions barring him from filing lawsuits in state courts. The District Court , at least, acknowledged that Wabeke disputed the facts. (See App C p 13a) However, Petitioner has found the courts are not about to listen to him.

Petitioner, depending upon this Court's decisions, does not believe the Respondent had any right to lie and/or mislead the state court in securing the permanent injunctions against him.

This Court has stated on numerous occassions that the goal of judicial proceedings is to find the truth. "Court proceedings are held for the solemn purpose of endeavoring to *ascertain the truth* which is the sine qua non of a fair trial." *Estes v Texas*, 381 US 532, 540, 14 L ed 2d 543, 85 S Ct 1628 (1965).(emphasis added)

In the unanimous decision *Lachance v Erickson*, 522 US 262 (1997) this Court said:

> "The core of due process is the right to notice and a meaningful opportunity to be heard" But we reject . . . the view . . . that a `meaningful opportunity to be heard' includes a right to make *false statements*." (emphasis added)

Respondent Mulder is an officer of the court. He has a supreme duty to be truthful about the law and facts. Failure to do so, Petitioner contends, imposes liability.

Petitioner believes that he was denied the right to show the fraud and deception in state and federal courts. An opposing party "must . . . be afforded a [full &] fair opportunity to show that . . . the stated reason . . . was in fact a *pretext* . ." *McDonnell Douglas Corp v Green*, 411 US 792, 804, 805, 36 L Ed 2d 668, 93 S Ct 1817 (1973).

It is evident from the District Court decision that Petitioner believed the information provided by Mulder was false and misleading. (See App C 13a)

This is an important question because others have been affected. The 6th Circuit has applied *Rooker-Feldman* to bar another *pro se* litigant a federal decision where, like here, *fraud* in the state case was a substantial issue. See *Metropolitian Life Ins. Co. v Brown*, (6th Cir. 2002, unpublished, 02-3318)

Petitioner believes that Mr. Mulder in the state cases commited fraud on the state courts to his injury. In *Hilton v Guyot*, 159 US 113 (1895) this Court held that both *fraud and prejudice* were sufficient reasons to undermine foreign judicial decisions. Therefore, Petitioner believes Respondent should have liability for his fraud also - in addition to other injuries acting under color of law.

Petitioner believes both fraud and prejudice are present in the state cases. The state judges are easily misled. They are judges like those described in the Declaration of Independence - owned by the king/state. Pro government. They have a bias for attorneys, government and against *pro se* litigants. It can be proven. (Judges are lawyers before

becoming judges. They are all members of the Bar. *Pro se* litigants are not allowed. Furthermore, judges receive "contributions" from lawyers for their elections.)

"When a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud, -- a fraud in fact, if he knows it to false; a fraud in law, if he does not know it to be true." *Davis v Wakelee*, 156 US 680, 689 (1895). By this definition Respondent Mulder commited fraud - he knew his claims were false.

B. Respondent has liability for retaliation.

In addition, Petitioner believes Mulder retaliated against him because Mulder had been the target of one or more of the previous Wabeke lawsuits. See App C at 10-11a, fn 2. And because he was at times the target of public criticism by Wabeke and had represented the City for years against Wabeke.

Retaliation for protected acts is clearly a civil rights violation. *Haddle v Garrison*, 525 US 121 (1998); *Rutan v Republican Party of Illinois*, 497 US 62, 75 at fn 8 (1990); *Board of Commissioner's Wabaunsee Co. v Umbehr*, 518 US ____, 135 L Ed 2d 843, 116 S Ct ____ (1996); *O'Hare Truck Service, Inc. v City of Northlake*, 518 US ____, 135 L Ed 2d 874, 116 S Ct ____ (1996); *Pickering v Board of Education*, 391 US 563, 571-572 (1968).

Fraud and retaliation must be allowed to proceed independent of *Rooker-Feldman*. Petitioner believes these acts separately and individually resulted in the violation of his civil rights and, therefore, that Respondent Mulder has liability. He would request that this Court find likewise.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition and address these important questions affecting his, and others, fundamental rights and provide relief.
Respectfully submitted,

_____ January ____, 2005

Paul Wabeke
PO Box 1132
Holland, Michigan 49423-1132

STATEMENTS ACCORDING TO 28 USC 1746

Based on knowledge, information and belief, I am a senior citizen who has been unjustly deprived of my property by the State. I survive on a meager social security check of less than $800 per month and have been a long time vocal critic of local (City of Holland) government officials, and their actions in relationship to their expenditure of public funds and other public acts, plus judges and lawyers.

My research, as a watchdog and whistleblower, has discovered many violations of law and rights - constitutional, state statutes, city charter, etc., and common law rights - by these officials and a lack of willingness on the part of superior state officials to even address these violations. Therefore, I have felt compelled to address them as best I can by means of lawsuits. In most cases I have paid the filing fees in my lawsuits and appeals. I paid, in 2003, all attorney fee sanctions accessed against me in all lawsuits to the City of Holland, even though I believe them to be unjust and oppressive - $4417.84.

Petitioner is convinced beyond doubt, due to his years of experiences and that of others he knows of who have had *pro se* experiences in Michigan courts, that *pro se* litigants cannot win in Michigan Courts no matter how good their case or defense. Petitioner has been involved in less than 20 lawsuits *pro se*, as defendant and plaintiff, and

has never won in over 15 years. It appears to me that the Michigan State Bar is the equivalent of a closed union shop and nonmembers are not allowed to win, no matter whether the law and constitution are both on their side. This is true regardless of Michigan Constitution Article 1, section 13, and 28 USC 1654, both supposedly protecting rights of *pro se* litigants. Of course the fact that all the judges are members of the same Bar does not help any, but smells of conflict of interest and lack of impartiality. In conclusion, I, and other *pro se* litigants, have found it impossible to enforce basic rights in Michigan state courts and consider them hostile to our rights.

"I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."
Executed on January ___ 2005.

_____

Paul Wabeke

APPENDIX A

03-2235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
June 17, 2004
LEONARD GREEN,
Clerk

PAUL E. WABEKE, Plaintiff-Appellant,

v.

ANDREW J. MULDER, Defendant-Appellee.

CALVIN L. BOSMAN, Judge and

HARRY BEACH, Judge, Defendants.

Before: KRUPANSKY and COLE, Circuit Judges; COOK, District Judge.*

NOT RECOMMENED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

Paul E. Wabeke, a Michigan resident proceeding pro se, appeals a district court order dismissing his civil action that sought an order to overturn injunctions issued against him by two state court judges in an

effort to deter Wabeke from filing frivolous lawsuits. Wabeke has filed a motion for judgment on the pleadings. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Wabeke filed this lawsuit on April 3, 2003, against an Ottawa County Circuit Court Judge (Calvin L. Bosman), an Allegan County Circuit Court Judge (Harry Beach), and a Holland, Michigan City Attorney (Andrew J. Mulder). Defendants Bosman and Beach issued injunctions against Wabeke. Attorney Mulder defended the City of Holland in two lawsuits in which the state courts found that injunctive relief against Wabeke was warranted.

On May 15, 2003, the district court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing Wabeke's claims against them with prejudice. Thereafter, on May 20, 2003, defendant Mulder filed a motion to dismiss, to which Wabeke responded. The district court granted the defendant's motion and dismissed the action pursuant to the provisions of Fed. R. Civ. P. 12(b)(1), concluding that the court lacked subject matter jurisdiction over the claims asserted in the complaint. Wabeke has filed a timely appeal.

We review de novo a district court's decision to dismiss an action for lack of subject matter jurisdiction. *Friends of Crystal River v. United States EPA*, 35 F.3d 1073, 1077-78 (6th Cir. 1994); *Willis v. Sullivan*, 931 F.2d 390, 395 (6th Cir. 1991). "Whenever it appears by suggestion of the parties or otherwise that the court

lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3).

Upon review, we conclude that the district court properly dismissed Wabeke's complaint for lack of subject matter jurisdiction. Because Wabeke's complaint merely reflected his dissatisfaction with the permanent injunction issued by the state court regarding his filing of further litigation and essentially sought federal court review of that state court order, the *Rooker-Feldman* doctrine precludes the exercise of federal jurisdiction. *See Dist. of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486 (1983); *Rooker v. Fid. Trust Co.,* 263 U.S. 413, 415-16 (1923). The *Rooker-Feldman* doctrine provides that federal district courts generally lack jurisdiction to review and determine the validity of state court judgments, even in the face of allegations that "the state court's action was unconstitutional." *Feldman,* 460 U.S. at 486; *see also Blanton v. United States,* 94 F.3d 227, 233-34 (6th Cir. 1996). Instead, review of final determinations in state judicial proceedings can be obtained only in the United States Supreme Court. 28 U.S.C. § 1257; *Feldman,* 460 U.S. at 476.

Accordingly, the district court's order is affirmed. The motion for judgment on the pleadings is denied. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX B

03-2235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
AUG 13, 2004
LEONARD GREEN,
Clerk

PAUL E. WABEKE, Plaintiff-Appellant,
v.
ANDREW J. MULDER, Defendant-Appellee.
CALVIN L. BOSMAN, Judge and
HARRY BEACH, Judge, Defendants.

Before: KRUPANSKY and COLE, Circuit Judges;
COOK, District Judge.*

Plaintiff-appellant has filed a motion to reconsider this court's order of June 16, 2004, affirming the district court's judgment that dismissed his civil rights action filed pursuant to 42 U.S.C. § 1983.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a).

The motion to reconsider is thus denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

*The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Plaintiff,

Case No. 1:03-cv-221

v. Honorable David W. McKeague

ANDREW J. MULDER, et al., Defendants.

ORDER OF DISMISSAL

In accordance with the accompanying opinion entered this date:

IT IS ORDERED that defendant's motion to dismiss plaintiff's claim (docket # 38) is GRANTED and plaintiff's complaint is hereby dismissed for lack of federal subject matter jurisdiction.

Dated: August 18, 2003

/s/ David W. McKeague
David W. McKeague
United States District Judge

CERTIFIED ECF DOCUMENT
I hereby attest and certify that this is a printed copy of a document which was electronically filed with the United States District Court for the Western District of Michigan on 8-18-03.

RONALD C. WESTON, SR CLERK OF COURT
By /s/M Jewell Deputy Clerk, dated 8-18 03.

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL E. WABEKE, Plaintiff,

Case No. 1:03-cv-221

v. Honorable David W. McKeague

ANDREW J. MULDER, et al., Defendants.

MEMORANDUM OPINION

This is a civil action brought by a *pro se* plaintiff. Plaintiff seeks an order from this court overturning injunctions issued against him by state court judges in an effort to deter plaintiff from filing frivolous lawsuits. Plaintiff named as defendants Ottawa County Circuit Court Judge Calvin Bosman; Allegan County Circuit Court Judge Harry Beach; and Holland, Michigan's City Attorney, Andrew J. Mulder. Defendants Bosman and Beach issued the injunctions. Attorney Mulder defended the City of Holland in the two lawsuits in which the state courts found that injunctive relief against plaintiff was warranted.

Plaintiff filed this lawsuit on April 3, 2003. On May 15, 2003, the court granted a motion to dismiss filed by Judges Bosman and Beach, dismissing plaintiff's claims against them with prejudice. (docket # 33). [1] On May 20, 2003, defendant Mulder filed a motion to dismiss.

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[1] Plaintiff did not proceed in forma pauperis, therefore, his complaint was not subject to initial screening.

(docket # 38). The court issued an order notifying plaintiff of his opportunity to respond to defendant's motion. (docket # 41). Plaintiff has filed his response (docket #'s 42, 44) and the matter is ready for decision. For the reasons set forth herein, defendant's motion to dismiss will be granted.

Applicable Standard

Federal courts are courts of limited jurisdiction which may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Therefore, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted). The first and fundamental question presented by every case brought to the federal district court is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "Quite aside from whether the parties raise jurisdictional issues themselves--or even attempt to consent or agree to federal jurisdiction--federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction." *Douglas v. E.G. Baldwin Assoc., Inc.*, 150 F.3d 604, 606 (6th Cir. 1998).

Plaintiff has the burden of proving this court's subject matter jurisdiction. See *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6thCir. 2003); *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002); *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269

(6th Cir. 1990).

Defendant's motion seeks dismissal pursuant to Fed. R. Civ. P 12(b)(1). The Sixth Circuit recognizes two types of 12(b)(1) motions: a "facial" attack challenging the sufficiency of the plaintiffs factual allegations, in which all well-pleaded factual allegations in the complaint are taken as true; and a "factual" attack challenging the actual fact of subject-matter jurisdiction, which is analyzed under Fed. R. Civ. P. 56 standards. See *Nichols*, 318 F.3d at 677; *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.3d 320, 324 (6th Cir. 1990). The difference is often significant, because under a factual challenge the district court is empowered to weigh the evidence, and no presumptions apply as to the truthfulness of plaintiffs allegations. See *United States v. A.D. Roe Co.*, 186 F .3d 717, 721-22 (6th Cir. 1999). The Sixth Circuit has clearly recognized that a district court is empowered to consider evidence beyond the pleadings and to resolve factual disputes when necessary to resolve challenges to subject-matter jurisdiction under Rule 12(b)(1). See Nichols, 318 F.3d at 677, *Madison-Hughs v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996); *RMI Titanium Co. v. Westinghouse Elec. Co.*, 78 F.3d 1125, 1133-34 (6th Cir. 1996). Here, defendant makes a factual attack.

Facts

In 1997, plaintiff filed a lawsuit in Ottawa County Circuit Court against the City of Holland. Ottawa County Circuit Court Judge Calvin L. Bosman was the presiding judge. On October 13, 1997, Judge Bosman entered a "Judgment for Dismissal, Permanent Injunction and Award of Costs." See *Wabeke v. City of*

Holland, No. 97-28451-CZ (Ottawa County Circuit Court Oct. 13, 1997). (Complaint, Ex. 0). Judge Bosman dismissed plaintiff's complaint for failure to state a claim and assessed costs against plaintiff in the amount of $500. Judge Bosman issued the following injunction:

> [A] permanent injunction is hereby issued precluding the Ottawa County Clerk from accepting any litigation filed by Plaintiff against the Defendant, City of Holland, any of its officials or any of its agents who have acted in their capacity as agents or officials for the City of Holland until the complaint of the Plaintiff has been reviewed by a circuit judge for the County of Ottawa for compliance with MCR 2.114(D) and upon receipt or evidence of a receipt to the Ottawa County Clerk evidencing payment of all costs in any proceeding previously imposed against the Plaintiff and in favor of the Defendant. Specifically excepted from this permanent injunction is any cause of action by the plaintiff which cites a personal injury to the Plaintiff or to any of his property. (Complaint, Ex. 0).

Plaintiff sought review of Judge Bosman's decision in the Michigan Court of Appeals. See *Wabeke v. City of Holland*, No. 207260, 1999 WL 33453855 (Mich. Ct. App. Feb. 23, 1999). The Court of Appeals rejected plaintiff's claims that Judge Bosman had abused his discretion and exceeded his authority by entering the order dismissing the case and imposing sanctions. 1999 WL 33453855, at *1. The Michigan Court of Appeals found that plaintiff's history of abusive lawsuits warranted

the injunctive relief ordered by Judge Bosman.

> The trial court did not clearly err in determining that sanctions were warranted, and did not abuse its discretion by imposing costs in the amount of $500 and by enjoining the circuit court clerk from accepting any further pleadings from plaintiff without prior approval from a circuit court judge. The trial court found that plaintiff signed the instant complaint in violation of MCR 2.114(D). This suit was the 17th action filed by plaintiff[2] against defendant and other parties since 1979.

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[2] Plaintiff's prolific litigation activities included multiple lawsuits in this court. See *Wabeke v. Maatman, et al.*, No. 1:91-cv-355 (W.D. Mich. May 30, 1991), aff'd, No. 91-1800, 1992 WL 58977, at * 1 (6th Cir. Mar. 26, 1992)(*res judicata* barred plaintiff's attempt to assert a cause of action arising out of ten state court lawsuits and seeking eleven million dollars in damages, declaratory relief, and a full-page written apology from defendants to be printed in the local newspaper), *cert. denied*, 506 U.S. 1072 (1993); *Wabeke v. Mulder*, No. 1:92-cv-200 (W.D. Mich. Apr. 22, 1994) (dismissing plaintiff's complaint for failure to state a claim); *Wabeke v. Mulder, et al.*, 4:95-cv-127 (W.D. Mich. Aug. 25, 1995) (granting defendants' motions to dismiss), aff'd, No. 95-2099, 1996 WL 571302 (6th Cir. Oct. 4, 1996) (affirming dismissal of plaintiff's claims that Judge Bosman and City Attorney Mulder had conspired to deprive plaintiff of due process of law in his state court suit against the City of Holland as barred by the *Rooker-Feldman* doctrine.

> All previous actions were dismissed. Sanctions were imposed in several cases; however, plaintiff did not pay as ordered. Plaintiff was afforded due process in connection with the imposition of sanctions. See *People v. Herrara* (On Remand), 204 Mich App 333, 339; 514 NW2d 543 (1994). Plaintiff's documented history of filing frivolous actions and ignoring orders warranted imposition of sanctions designed to prevent such actions in the future. 1999 WL 33453855, at *1.

Plaintiff does not allege and has not shown that he sought leave to appeal this decision to the Michigan Supreme Court or that he petitioned the United States Supreme Court for a writ of certiorari seeking review of Judge Bosman's injunction.

The City of Holland is located within both Ottawa and Allegan Counties. In 2002, plaintiff filed another lawsuit against the City of Holland, this time in the Allegan County Circuit Court. On May 7, 2002, Allegan County Circuit Court Judge Harry A. Beach entered a "Judgment for Defendant for Summary Disposition, Permanent Injunction and Award of Costs." See *Wabeke v. City of Holland*, No. 02-31220-CZ (Allegan County Circuit Court May 7, 2002) (Complaint, Ex. P). Plaintiff does not allege that he sought appellate review of this decision in either Michigan's appellate courts or in the United States Supreme Court.

Plaintiff filed this lawsuit on April 3, 2003.

Discussion

As plaintiff is well aware, this court does not possess

direct oversight powers over state courts. It is patent that this court lacks jurisdiction to review the state-court decisions[3] plaintiff attempts to challenge in this lawsuit. See *District of Columbia Circuit Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995); see also *Warren v. Garn*, No. 02-1658, 2002 WL 31809068, at 1 (6th Cir. Dec. 12, 2002); *Kovats v. Hi-Lex Corp.*, No.02-1318, 2002 WL 31780951, at 2 (6th Cir. Dec. 11, 2002); *Metropolitan Life Ins. Co. v. Brown*, No.02-3318, 2002 WL 31012126, at *1 (6th Cir. Sept. 6, 2002).

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[3] The right of access to courts is neither absolute or unconditional, and there is no right of access to the courts to prosecute an action that is frivolous and malicious. See *Tripati v. Beaman*, 878 F .2d 351, 353 (1Oth Cir. 1989). The injunctions imposed by the state courts are consistent with those issued by federal courts under similar circumstances. See, e.g., *Sassower v. American Bar Ass'n*, 33 F.3d 733, 736 (7th Cir. 1994) (court review and approval before acceptance of any proposed future filings by plaintiff); *United States ex rel. Verdone v. Circuit Court for Taylor County*, 73 F.3d 669, 675 (7th Cir. 1995)(requiring plaintiff to pay all costs and attorney's fees imposed and to post a bond before allowing plaintiff to file another civil lawsuit against defendants); see also *Callihan v. Kentucky*, No. 01-6555, 2002, at * (6th Cir. June 12, 2002) (upholding injunction imposing prefiling restrictions); *Stewart v. Fleet Fin.*, No.99-2282, 2000 WL 1176881, at *2 (6th Cir. Aug. 10, 2000) (affirming this court's order requiring plaintiff to file a $25,000 cash bond and other restrictions in any future action against defendants.

"The *Rooker-Feldman* doctrine . . . holds that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims `inextricably intertwined' with issues decided in state court proceedings." *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002). Plaintiff certainly disagrees with arguments Attorney Mulder made in state court and believes that Mulder mislead the state court judges. The Michigan Court of Appeals rejected plaintiff's arguments and found that the injunctive relief ordered by Judge Bosman was appropriate given plaintiff's history of litigation abuses. Plaintiff apparently elected not to seek state court appellate review of Judge Beach's decision. Plaintiff's claims against defendant Mulder are inextricably intertwined with the state court judgments. See *Pieper v. American Arbitration Ass 'n, Inc.*, No. 01-4043, __F.3d __, 2003 WL 21663246, at. *2 (6th Cir. July 11, 2003) ("When granting relief on the federal claim would imply that the state-court judgment on other issues was incorrect, federal courts do not have jurisdiction . . . ."); *see also Baker v. Michigan Family Independence Agency*, No. 03-1022, 2003 WL 21674747, at *1 (6th Cir. July 16, 2003); *Riser v. Franklin County Court of Common Pleas*, No. 02-4309, 2003 WL 21774011, at *1 (6th Cir. July 30, 2003) (district court properly found plaintiff's claims barred by the *Rooker-Feldman* doctrine because he sought to relitigate his prior state court actions, even though his intent to do so was veiled by nominal allegations of constitutional violations); *Akers v. Bishop*, No. 02-6235, 2003 WL 21019171, at *2 (6th Cir. May 2, 2003).

Conclusion

For the reasons set forth herein, defendant's motion will be granted and plaintiff's Complaint dismissed for lack of subject matter jurisdiction.

Dated: August 18, 2003

/s/David W. Mc Keague
David W. Mc Keague
United States District Judge

[stamped] Original Filed Electronically
Ronald C. Weston, Sr.,Clerk

APPENDIX D

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479.3011

November 3, 2004

Mr. Paul Wabeke
P.O. Box 1132
Holland, MI 49423-1132

Re: Paul E. Wabeke v. Andrew J. Mulder, et al.
Application No. 04A373

Dear Mr. Wabeke:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 3, 2004 extended the time to and including January 10, 2005.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
/s/ Ann McCamey
By Ann McCamey
Case Analyst